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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

ORIGINAL COPY

No. 79-6519

NAHUM ZACKAI, Appellant,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR CHICAGO STATE UNIVERSITY, Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

Motion To Dismiss

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Dated: May 28, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6519

NAHUM ZACKAI, Appellant,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR CHICAGO STATE UNIVERSITY, Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

MOTION TO DISMISS

Appellee, pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein on the following grounds:

1. Appellant has not complied with Rule 53 of the Supreme Court of the United States in filing his motion to proceed in forma pauperis.

2. The federal question sought to be reviewed was not timely raised by Appellant and was not passed upon by the Illinois Supreme Court.

3. Zackai's appeal does not involve a decision of the Illinois Supreme Court upholding the validity of a state statute challenged as being repugnant to the federal Constitution.

4. Zackai's appeal does not raise a substantial and important federal question.

Statement

On October 30, 1976, Appellant Nahum Zackai, hereinafter Zackai, filed a charge of unfair employment practice against Appellee, Board of Governors of State Colleges and Universities for Chicago State University, hereinafter BOG, with the Illinois Fair Employment Practices Commission. In his charge, Zackai alleged that BOG had discriminated against him by refusing to allow him to rescind a resignation letter he previously submitted. (BOG's Petition for Writ of Prohibition - Exhibit A.)

On June 22, 1978, the Illinois Fair Employment Practices Commission, hereinafter FEPC, filed a complaint of unfair employment practice against BOG. (BOG's Petition for Writ of Prohibition - Exhibit F.)

On June 27, 1978, BOG filed with FEPC Administrative Law Judge Patricia Patton a motion to dismiss FEPC's complaint asserting as grounds therefor that the FEPC lacked subject matter jurisdiction with respect to its complaint against BOG by reason of Section 8.01(a) of the Illinois Fair Employment Practices Act, hereinafter FEPA, which requires the FEPC to file a complaint based upon a complainant's charge or dismiss the charge within 180 days of the proper filing of the charge. (BOG's Petition for Writ of Prohibition - Exhibit G.)

On January 31, 1979, Administrative Law Judge Patricia Patton denied BOG's motion to dismiss; ordered BOG to file an answer within fifteen days; ordered a pre-hearing memorandum to be filed on or before April 30, 1979; and scheduled a public hearing for May 9 through May 11, 1979. (BOG's Petition for Writ of Prohibition - Exhibit H.)

On February 14, 1979, BOG filed with Administrative Law Judge Patton a motion for reconsideration; a motion for leave to appear and present oral argument; and a motion to have the jurisdictional questions raised by BOG certified to the FEPC. (BOG's Petition for Writ of Prohibition - Exhibit I.) Thereafter, Patton denied BOG's motion for oral argument; denied BOG's motion for reconsideration of her ruling with respect to timeliness of the complaint; denied BOG's motion for certification of the questions raised by BOG's motion to dismiss and motion for reconsideration; and allowed BOG to submit a memorandum of law in support of its contention that FEPC lacked jurisdiction in light of Zackai's filing of an action in the Illinois Court of Claims based upon similar theories to those asserted in his charge filed with the FEPC. (BOG's Petition for Writ of Prohibition - Exhibit J.)

On March 6, 1979, BOG filed "Points and Authorities" in support of the proposition that the Illinois Court of Claims had exclusive jurisdiction over Zackai's claim. (BOG's Petition for writ of Prohibition - Exhibit K.)

On March 13, 1979, Administrative Law Judge Patricia Patton entered an order denying BOG's motion to dismiss and ordered BOG to file an answer to FEPC's complaint. (BOG's Petition for Writ of Prohibition - Exhibit L.)

On April 6, 1979, BOG filed with the Supreme Court of the State of Illinois a motion for leave to file a petition for writ of prohibition and a motion for stay of the Zackai FEPC proceeding. The Illinois Supreme Court granted BOG's motions and stayed all proceedings before the FEPC.

On May 1, 1979, Zackai filed a motion to dismiss BOG's petition for writ of prohibition. In his motion, Zackai urged dismissal of BOG's petition on grounds that the filing requirement established by Section 8.01(a) of the FEPA was directory rather than mandatory; that BOG had failed to exhaust its remedies prior to filing its petition for writ of prohibition and that BOG had waived the filing requirement of Section 8.01(a) of the FEPA. Zackai did not in his motion claim in any fashion that Section 8.01(a) of the FEPA was constitutionally defective.

On May 12, 1979, BOG filed its objection to Zackai's motion to dismiss.

On June 15, 1979, BOG filed its brief in support of its petition for writ of prohibition.

On September 5, 1979, Zackai filed his "Brief and Argument" in opposition to BOG's petition for writ of prohibition. In his brief, Zackai suggested four issues for review but did not advance any claim that Section 8.01(a) of the Illinois FEPA was constitutionally defective.

On November 21, 1979, the Illinois Supreme Court entered its decision and ordered that a writ of prohibition be issued in favor of the BOG.

On December 12, 1979, Zackai filed with the Illinois Supreme Court a petition for rehearing relative to the Supreme Court's decision awarding the writ of prohibition. In said petition, Zackai suggests for the first time that Section 8.01(a) of the FEPA was repugnant to the Constitution of the United States and thus invalid. Specifically, Zackai argued that the Supreme Court "overlooked state and federal due process

implications" of the Court's holding that the 180-day filing requirement of Section 8.01(a) was mandatory.

On February 1, 1980, the Illinois Supreme Court denied Zackai's petition for rehearing without comment.

Questions Presented

1. Has Appellant complied with Rule 53 of the Supreme Court of the United States in filing his motion to proceed in forma pauperis?

2. Was the federal question which Appellant seeks to have this Court review timely raised by Appellant?

3. Does Zackai's appeal involve a decision in favor of the validity of a statute of the State of Illinois where a proper claim was made that the statute was repugnant to the Constitution of the United States?

4. Does Zackai's appeal raise a substantial and important federal question?

Argument

Appellee, Board of Governors of State Colleges and Universities, by its motion to dismiss presents four separate and alternative grounds for dismissal of Zackai's appeal. Arguments and case citations in support of each of Appellee's grounds for dismissal follow in separate discussion sections.

Appellant Has Not Complied With Rule 53 of the Supreme Court of the United States In Filing His Motion To Proceed In Forma Pauperis

In the case at bar, Appellant Zackai has filed an affidavit in support of his motion to proceed in forma pauperis.

In said affidavit, Zackai declares in a conclusory fashion that "because of my poverty, I am unable to pay the costs of said cause". Zackai's conclusory declaration is, however, not supported by facts. Thus, Zackai's affidavit does not comply with paragraph 1 of Rule 53 of the Supreme Court of the United States. Said paragraph requires that a party desiring to proceed in the Supreme Court in forma pauperis submit an affidavit setting forth facts which show that he comes within statutory requirements. See 28 U.S.C., Section 1915; Dryer v. Jalet , 349 F.Supp. 452 (1972). Accordingly, Zackai's motion to proceed in forma pauperis should be denied. Further, his appeal should be dismissed if he fails to file a proper affidavit in support of proceeding in forma pauperis, or fails to properly file and docket an appeal in the regular manner.

The Federal Question Sought To Be Reviewed Was Not Timely Raised By Appellant And Was Not Passed Upon By The Illinois Supreme Court

In his jurisdictional statement, Appellant Zackai urges the United States Supreme Court to grant him an appeal as a matter of right under 28 U.S.C., Section 1257(2) on the ground that the filing time limit prescribed by Section 8.01(a) of the Illinois FEPA violates the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. However, for Zackai to be entitled to an appeal of right under 28 U.S.C., Section 1257(2) it was incumbent upon him to present his constitutional challenge to the validity of Section 8.01(a) of the FEPA to the Illinois Supreme Court in a proper and timely manner. This Zackai did

not do. Zackai totally failed to mention the existence of any constitutional issue in his motion to dismiss BOG's petition for writ of prohibition. Further, Zackai made no mention of constitutional infirmity with respect to Section 8.01(a) of the FEPA in written or oral arguments to the Illinois Supreme Court. It was not until after the Illinois Supreme Court entered a decision against him that Zackai belatedly advanced his constitutional claim in a petition for rehearing presented to the Illinois Supreme Court. This claim of constitutional invalidity of Section 8.01(a) of the Illinois FEPA comes too late. See for example Hanson v. Denckla, 357 U.S. 235 (1958). Clearly, Zackai had ample opportunity to raise any and all constitutional issues prior to the rehearing stage of the proceedings before the Illinois Supreme Court. Certainly, the Illinois Supreme Court's decision was not, or should not have been, unanticipated by Zackai in light of the Illinois Supreme Court's clear and unambiguous holding in Springfield-Sangamon County v. FEPC, 71 Ill.2d 61, 373 N.E.2d 1307 (1978). In other words, there was no excuse for Zackai not presenting his constitutional arguments with respect to the validity of Section 8.01(a) of the FEPA to the Illinois Supreme Court before that Court rendered its decision on November 21, 1979. Thus, the Illinois Supreme Court was not obligated to pass upon Zackai's constitutional claims and properly chose not to comment upon same in denying Zackai's petition for rehearing. See Republic Life Insurance Co. v. Swigert, 135 Ill. 150, 25 N.E. 680 (1890). Accordingly, Zackai is now foreclosed from having this Honorable Court review his belatedly asserted constitutional claims. See for example Michigan v. Tyler, 436 U.S. 499 - Footnote 7 (1978); Hill v. California, 401 U.S. 797 (1970).

Zackai's Appeal Does Not Involve A Decision Of The Illinois Supreme Court Upholding The Validity Of A State Statute Challenged As Being Repugnant To The Federal Constitution

In the case at bar Zackai argues in his jurisdictional statement that the Illinois Supreme Court incorrectly ruled that Section 8.01(a) of the Illinois FEPA was a mandatory filing requirement, noncompliance with which resulted in FEPC's loss of jurisdiction to proceed with respect to Zackai's charge of discrimination. Thus, it is quite clear that what Zackai is attempting to do through his appeal is to challenge the Illinois Supreme Court's construction of legislation promulgated by the Illinois General Assembly. This attempt should not be permitted to succeed as it is clearly established that the United States Supreme Court lacks jurisdiction to construe state legislation. United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971). Stated another way, appellate jurisdiction does not lie under 28 U.S.C., Section 1257(2) where the construction of a state statute rather than the constitutional validity of same is in issue. See Labine v. Vincent, 401 U.S. 532 (1970) and Louisville & Nashville Railroad Co. v. City of Louisville, 166 U.S. 709 (1897). Accordingly, this Honorable Court should dismiss Zackai's appeal.

Zackai's Appeal Does Not Raise A Substantial And Important Federal Question

Zackai claims in his jurisdictional statement that the United States Supreme Court should grant plenary review of his cause because of the substantial and important federal question he raises. Specifically, Zackai suggests that he has been denied rights guaranteed to him under the Fourteenth

Amendment to the United States Constitution by the Illinois Supreme Court's decision in Board of Governors v. FEPC, et al., 78 Ill.2d 143, 399 N.E.2d 590 (1979), and by his loss of employment in the BOG system. Zackai's suggestion of a substantial and important federal question is, however, unfounded. In this regard, the following matters are of particular note:

(1) Zackai's claim that the Illinois Supreme Court's decision has the resulting effect of denying him his day in court on the merits of his discrimination charge is false and misleading. Zackai has, from the date of his separation from the Board of Governors system, had a choice of forums available for advancing his discrimination claim. These forums included the Illinois Court of Claims. And, on June 15, 1978, Zackai did in fact file a complaint with the Illinois Court of Claims seeking monetary damages. That action is presently pending. Appendix, pages 1-5. Further, Zackai as well as other complainants whose charges were not timely processed by the Illinois FEPC, theoretically may pursue their discrimination cases under Public Act 80-1455 promulgated by the Illinois General Assembly on September 16, 1978. See Illinois Revised Statutes, 1979, Chapter 48, para. 858.01(a).

(2) Contrary to the assertion at page 24 of Zackai's jurisdictional statement, Zackai has no protectable property interest in continued employment in the Board of Governors of State Colleges and Universities system. Zackai submitted a letter of resignation on

May 12, 1976, which was accepted by CSU Vice President Allen DeGiulio on May 18, 1976. (BOG Petition for Writ of Prohibition - Exhibit C.) This transaction extinguished any claim to a property interest in continued employment which Zackai might previously have enjoyed. Gras v. Clark, 46 Ill.App.3d 803, 361 N.E.2d 316 (1977).

(3) Zackai's claim of a property interest in continued employment protected by the Fourteenth Amendment to the United States Constitution was not and could not have been presented to the Illinois FEPC as that administrative agency deals only with alleged violations of the Illinois Fair Employment Practices Act. Thus, any issue of whether or not Zackai had a protectable property interest in continued employment is not properly before this Court.

(4) Zackai has no claim that he was denied due process by the Illinois Supreme Court. The issues before the Illinois Supreme Court were clearly raised by BOG's petition for writ of prohibition and Zackai fully participated in the proceedings before the Illinois Supreme Court. Thus, Zackai had full opportunity to present his arguments relative to the proper construction to be given Section 8.01(a) of the FEPA and its impact upon himself and other complainants. Notwithstanding this opportunity, Zackai made no claim of constitutional infirmity with respect to Section 8.01(a) of the FEPA until the rehearing stage of the Supreme Court proceeding.

(5) Zackai's claim that he has a constitutional right to have the Illinois FEPC decide his case on the merits is totally unfounded under the facts and case

law related to this case. Quite to the contrary, pertinent facts and case law suggest that:

(a) Zackai has no claim that he was deprived of any right by the statute of limitations established by the Illinois General Assembly, as construed by the Supreme Court of Illinois. It has been consistently held that the establishment of a statute of limitations is a permissible exercise of state authority. Rand v. Bossen, 27 Cal.2d 61, 162 P.2d 457 (1945). And, equal protection of the laws is not violated by a state in establishing a statute of limitations. Chase Security Corp. v. Donaldson, 325 U.S. 304 - Footnote 5 (1945).

(b) Zackai has no claim that the Illinois FEPC was required to reach a determination with respect to his charge. A state has the absolute right to determine the extent of authority of its administrative agencies. Mobile Jackson & Kansas City Railroad Co. v. State of Mississippi, 210 U.S. 18 (1908). Further, the state has a clear right to establish preconditions to an administrative agency's or court's assumption of jurisdiction. Londoner v. Denver, 208 U.S. 409 (1908) and Pennsylvania Railroad Co. v. Towers, 245 U.S. 6 (1917).

(6) Zackai's claim that the policy of Illinois regarding jurisdictional time limits is harsh and unfair

to himself and other complainants is insufficient to raise a federal question. It is not the province of the United States Supreme Court to consider the wisdom of a state's policy as manifested in its legislation. California State Auto Association International Ins. Bureau v. Maloney, 341 U.S. 105 (1951). Further, defects in state administrative remedies or procedures do not necessarily present a substantial federal question under the due process clause. Utley v. City of St. Petersburg, Florida, 292 U.S. 106 (1934).

In that Appellant's claim of a substantial and important federal question is unsupported by the facts and case law related to this case, it must be rejected. This Court should thus summarily dismiss Zackai's appeal for want of a substantial and important federal question.

Conclusion

For all of the foregoing reasons, Appellee moves that this appeal be dismissed.

Respectfully submitted,

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES

By Richard T. Dunn
Richard T. Dunn

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FILED
COURT OF CLAIMS
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ALAN J. DIXON
Secretary of State and
Ex-Officio Clerk Court of Claims

IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

NAHUM ZACKAI,

Claimant,

v.

CHICAGO STATE UNIVERSITY, and THE BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF THE STATE OF ILLINOIS,

Respondents.

CLAIM 78-CC-1049

Amount Claimed: $92,580.54

FILED IN THE COURT OF CLAIMS
CLERK'S OFFICE

COMPLAINT

Nature of Claim

1. This is a claim for damages for discriminatory employment practices under the Illinois Equal Opportunities for the Handicapped Act, Ill. Rev. Stat., ch. 38 §§65-21 through 65-31, brought here pursuant to the Court of Claims Act, Ill. Rev. Stat., ch. 37 §§439.1 et. seq.

Parties

2. Claimant Nahum Zackai, is a resident of the State of Illinois, County of Cook. At all times relevant to this Complaint, through and including June, 1976, Claimant was a tenured professor at Defendant Chicago State University.

3. Respondent, Chicago State University, is an institution of higher education located in Chicago, Illinois and established as an agency of the State of Illinois under Ill. Rev. Stat., ch. 144 §1101.

4. Respondent, The Board of Governors of State Colleges and Universities (hereinafter "Board of Governors") is an agency of the State of Illinois created by Ill. Rev. Stat., ch. 144 §1001, et. seq.

5. Respondent Board of Governors is responsible for the operation, management and control of Respondent Chicago State University pursuant to Ill. Rev. Stat., ch. 144 §§1001 and 1103.

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6. The Court of Claims has jurisdiction of this claim pursuant to Ill. Rev. Stat., ch. 144 §1007 and Ill. Rev. Stat., ch. 37 §§439.1 et. seq.

7. At all times mentioned herein, Allan DeGiulio was the Vice-President for Academic Affairs of Chicago State University and the authorized agent of the Respondents, and each of them, and the actions and omissions of Allan DeGiulio herein alleged were done pursuant to said agency and within the authorized scope of said agency.

Cause of Action

8. In May, 1976, Claimant suffered a hemorrhage behind his eyes and, as a result thereof, Claimant's eyesight was permanently damaged and Claimant was thereafter continuously physically handicapped.

9. On or about May 12, 1976, Claimant wrote to Dr. Allen DeGiulio and requested that Claimant be permitted to take an early retirement effective June 30, 1976. A true copy of that letter is attached hereto as Exhibit A.

10. On or about June 17, 1976, Claimant in writing withdrew his May 12th retirement request by letter mailed to Allan DeGiulio. A true copy of this letter is attached hereto and made a part hereof and marked Exhibit B.

11. On or about June 29, 1976, Allan DeGiulio notified Claimant that the Respondents refused to permit Claimant to withdraw his retirement request. In a letter to Claimant, DeGiulio stated that it was "not possible for the University to revoke its acceptance of (Dr. Zackai's) notice of retirement at this late date." A true copy of this letter is attached hereto and made a part hereof and marked Exhibit C.

12. On or about July 29, 1976, Respondent Board of Governors forced Claimant to retire and refused to permit Claimant to withdraw his request for early retirement.

13. The Respondents and each of them discriminated against Claimant because of his physical handicap in violation of Ill. Rev. Stat., ch. 38 §65-23 by refusing to permit Claimant to withdraw his request for early retirement and by refusing to consider Claimant for reinstatement and by refusing to rehire or reinstate Claimant.

14. The above described actions of the Respondents and each of them constitute an unlawful employment practice in violation of Ill. Rev. Stat., ch. 38, §§65-23, 65-29.

15. As a direct and proximate result of the above described actions of the Respondents, and each of them, Claimant has been damaged in that Claimant has been unemployed and unable to earn his full salary all to his damage in the amount of Forty-two Thousand Five Hundred and Eighty and fifty-four/100 ($42,580.54) Dollars.

16. As a direct and proximate result of the action of the Respondents and each of them as described above, Claimant has been humiliated, has lost self respect, and has otherwise suffered great mental pain and anguish all to his damage in the additional amount of Fifty Thousand and no/100 ($50,000.00) Dollars.

Previous Claims of Discrimination

17. On or about November 30, 1976, Claimant filed a charge with the Fair Employment Practice Commission of Illinois claiming that Chicago State University had discriminated against him because of his physical handicap, blindness, in violation of the Illinois Fair Employment Practices Act, Ill. Rev. Stat., ch. 48 §§851 et. seq. On or about April 12, 1978, the Illinois Fair Employment Practice Commission found substantial evidence that Respondent Chicago State University had discriminated against Claimant in violation of the Illinois Fair Employment Practices Act. At the time of the filing of this complaint, Claimant's Fair Employment Practices Commission charge is pending in conciliation.

Other Procedural Allegations

18. Claimant at all times relevant hereto was, and he still is, the only owner of the claim set forth herein and no assignment transfer or other disposition of this claim has been made by Claimant or anyone on his behalf.

19. Claimant is justly entitled to the amount of money hereinbefore set forth from Respondents Chicago State University and the Board of Governors.

20. Claimant has not presented this claim or any other claim arising out of this occurrence to any other tribunal except as hereinbefore set forth.

WHEREFORE, Claimant respectfully requests that he be awarded the sum of Ninety-Two Thousand Five Hundred and Eighty and fifty-four/100 ($92,580.54) Dollars and be immediately reinstated as a full professor at Respondent Chicago State University with all seniority and benefits he would have received had he been continuously employed.

_____
Claimant

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Nahum Zackai being duly sworn, upon oath deposes and says that he is the same person who signed the foregoing complaint, that he knows the contents thereof, and that the facts therein set forth are true.

_____
Claimant

Street _____
City, State _____
Zip Code _____ Phone _____

Subscribed and Sworn to
before me this ____ day
of June, 1978.

_____
Notary Public

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Ronald W. Staudt, being first duly sworn, deposes and states that he read the foregoing complaint and verification to Nahum Zackai word for word and that Nahum Zackai thereafter signed the complaint and verification on the 14th day of June, 1978.

Ronald W. Staudt

Subscribed and Sworn to
before me this 14th day
of June, 1978.

Notary Public

Randolph N. Stone
Attorney for Claimant
Mandel Legal Aid Clinic
6020 South University Avenue
Chicago, Illinois 60637
Telephone: (312) 324-5181

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No._____

NAHUM ZACKAI, Appellant,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES
FOR CHICAGO STATE UNIVERSITY, Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

AFFIDAVIT

I, Kathryn McCary, being first duly sworn according to law, depose and say that:

1. I have no interest in the above-entitled case.
2. On this day, I read to Nahum Zackai his attached affidavit.
3. He stated that each and every paragraph was true.

Further affiant sayeth not.

Kathryn McCary

Subscribed and Sworn to
before me this 30th day
of April, 1980.

Notary Public